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APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-286

IOWA BEEF PACKERS, INC., *Petitioner*

v.

EDWARD D. THOMPSON, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IOWA

PETITION FOR CERTIORARI FILED JUNE 16, 1971
CERTIORARI GRANTED OCTOBER 12, 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-286

IOWA BEEF PACKERS, INC., *Petitioner*

v.

EDWARD D. THOMPSON, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IOWA

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IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

(This is one of 14 Petitions, all identical except for amounts claimed. The *Caption in Full*, after Consolidation of the cases, is shown at A.7 herein and in all judgments and orders.)

JAMES R. MORGAN, *Plaintiff*,

v.

IOWA BEEF PACKERS, INC., *Defendant.*

Petition at Law

Plaintiff for cause of action states:

1. That Plaintiff is a resident of Crawford County, State of Iowa.

2. Plaintiff brings this action to recover from Defendant unpaid wages and overtime compensation in the amount of $1,487.16, and an additional equal amount of liquidated damage and a reasonable attorney fee, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 as amended (U.S.C. Title 29, Sections 201-219), hereinafter referred to as the Act.

3. Jurisdiction is conferred on the Court by Section 16(b) of the Act (U.S.C. Title 29, Section 216b).

4. At all times, hereinafter mentioned, the Defendant was and is a Corporation organized and existing under and by virtue of the laws of the State of Iowa, and at all times, hereinafter mentioned, was engaged at Denison, Crawford County, Iowa, and elsewhere in the operation of packing plants where domestic animals are slaughtered, butchered, dressed, and prepared for market and meat products, and meat by-products are manufactured and produced for interstate commerce within the meaning of the Act. Substantially all of the goods produced by the Defendant, during

the times herein mentioned, have been sold, offered for transportation, transported, shipped and delivered in interstate commerce with knowledge that shipment, delivery or sale thereof in interstate commerce was intended from the Defendant's places of business at Denison, Iowa, and elsewhere, to various points outside the State of Iowa. The volume of such production, sale, shipment and delivery was and is not less than $1,000,000.00 annual gross volume.

6. That during the work weeks beginning at a time not earlier than two years before the filing of this complaint and ending on the 28th day of April, 1967, the Defendant employed the Plaintiff in the maintenance department at the Defendant's plant in Denison, Iowa. That the services performed by the Plaintiff were necessary and an integral part of and directly essential to the Defendant's business and to the production of the commodity shipped by the Defendant in interstate commerce.

7. That the duties performed by the Plaintiff consisted, among other things, of maintaining and repairing plant equipment and machinery so as to keep said equipment and machinery in good running order, and in order to perform these duties to the satisfaction of the Defendant, the Plaintiff was required to be on call during his alleged thirty minute meal period of each work day. That the Plaintiff being on call during his alleged meal time was and is a necessary and an integral part of the Defendant's operation, and required the Plaintiff to be on duty an additional one half hour each day in addition to the regular forty hour week, but the Defendant refuses to pay Plaintiff for this time. That the Plaintiff should be compensated for this time at the rate of one and one-half times his regular hourly rate.

8. That during such time Plaintiff worked forty hours or more each week, not including said daily thirty minutes period and said thirty minute daily period is additional time worked over forty hours a week, and Defendant has

failed and refused to compensate Plaintiff for said time worked at rates not less than one and one-half times the regular rates at which he was employed, as required by Section 7 of the Act. Plaintiff was accordingly underpaid the sum of $2.43 for each thirty minute period above referred to or the sum of $1,487.16 for the said period.

9. That it has been necessary for the Plaintiff to engage, and he has engaged, the services of attorneys to file and prosecute this action. Affidavit for attorney fees is hereto attached marked Exhibit "A".

WHEREFORE, Plaintiff prays that judgment be awarded him in the amount of $1,487.16 unpaid wages and overtime compensation, and for an additional amount as liquidated damages, together with costs; and that the Court allow Plaintiff a reasonable attorney's fee to be paid by the Defendant.

/s/ JAMES R. MORGAN

(Formal verification omitted in printing)

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

(This is one of 14 Answers, all identical. The *Caption in Full* after Consolidation of the 14 cases, is shown at A.7 herein and in all judgments and orders.)

Answer

(Caption omitted in printing)

COMES Now the Defendant and for Answer to Plaintiff's Petition states:

1. Defendant does not controvert the allegations of Paragraph 1.

2. Defendant admits that the action is brought for the purposes stated in Paragraph 2 of the Petition but denies that any amount is due from the Defendant to the Plaintiff.

3. Defendant admits the allegations of Paragraph 3, subject, however; to the affirmative defense alleged in Paragraph 10 of this Answer.

4. Defendant does not controvert the allegations of Paragraph 4.

5. There is no Paragraph 5 in the Petition and accordingly no Answer can be given.

6. Defendant does not controvert the allegations of Paragraph 6.

7. Defendant admits that the duties performed by the Plaintiff consisted, among other things, of maintaining and repairing plant equipment and machinery so as to keep said equipment and machinery in good order, but denies that Plaintiff was required to be on call during his thirty (30) minute meal period of each work day in order to perform the duties to the satisfaction of the Defendant, or for any other reason. Defendant states affirmatively that Plaintiff was not required to be on call during his thirty (30) minutes meal period and that Plaintiff on every work day was allowed thirty (30) minutes to eat his meal. Defendant denies all the remaining allegations of Paragraph 7.

8. Defendant denies that during the time involved in the Petition the Plaintiff worked forty (40) hours or more during every week, but admits that such would be true as to most of the weeks. Defendant admits that it has failed and refused to compensate Plaintiff for the time claimed in the Petition and that if such pay were due, in most weeks it would be at rates not less than one and one-half times the regular rate at which he was employed, as required by Section 7 of the Act but expressly denies that any such sums are due to the Plaintiff. Defendant denies the remaining allegations of Paragraph 8.

9. Defendant denies that it has been necessary for the Plaintiff to engage the services of attorneys to file and

prosecute this action, but admits that he has engaged such services and admits the Affidavit for Attorney Fees was attached to the Petition and marked Exhibit "A".

10. Plaintiff states affirmatively that it is now admitted upon this record that Plaintiff's employment at Defendant's plant in Denison was covered by Collective Bargaining Agreements at all times material herein between Associated Employees Organization and Defendant and that Exhibit "A" attached to the Request For Admissions is a true and correct copy of the Collective Bargaining Agreement for the time specified therein and that Plaintiff did not take any of the Steps permitted under the Grievance Procedures of the Collective Bargaining Agreements. Accordingly Plaintiff having failed to exhaust such Grievance Procedures is not entitled to bring this action and this action should be dismissed for such failure.

WHEREFORE Defendant prays that Plaintiff's action be dismissed at Plaintiff's costs.

P. L. NYMANN
P.O. Box 248
Dakota City, Nebraska 68731
Attorney for Defendant

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

(This is one of 14 Motions, all identical. Caption omitted in printing.)

Motion for Separate Adjudication of Law Points

COMES Now the Defendant and moves the Court to separately hear and determine the point of law raised in Paragraph 10 of its Answer, as provided by Rule of Civil Procedure 105, because said point of law raises a legal issue directed to substantially the whole if not the whole of the

Plaintiff's alleged cause of action and adjudication favorably to the Defendant will dispose of substantially all, if not all, of the case.

P. L. NYMANN
P.O. Box 248
Dakota City, Nebraska 68731
Attorney for Defendant

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

Ruling of Trial Court Denying Petitioner's Motion to Dismiss

No. 21894—Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Plaintiffs*,

v.

IOWA BEEF PACKERS, INC., *Defendant.*

Before the HONORABLE A. J. BRAGINTON, Judge.

Ruling filed March 5, 1968 (in each of 14 cases).

On Motion for Separate Adjudication of Law Points (motion filed September 19, 1967).

The defendant is asking the court to determine the points of law raised in paragraph 10 of it's answer. (sic)

In this action the plaintiff is seeking compensation for 30 minute meal periods for which he has not been compensated. Plaintiff asserts that in the performance of his

duties in his employment by the defendant he was required to be subject to call during said meal periods, and that by reason of his being subject to call, said period of time was and is a necessary and integral part of defendant's operation and therefore such periods are compensable under the act. Defendant admits plaintiff was not paid for such periods, and asserts that plaintiff was not required to be subject to call during said periods and such periods of time are not compensable.

If upon trial it was found that under the act such 30 minute meal periods are compensable, the fact that his employment in defendant's plant was subject to a collective bargaining agreement or that plaintiff did not proceed as provided under the grievance procedures of such agreement and thus failed to exercise the grievance provisions of the agreement, such does not preclude recovery by the plaintiff for wages due for work which is compensable under the act, and it follows that defendant would not be entitled to have plaintiff's case dismissed as alleged in paragraph 10 of it's answer. (sic)

This court determines that the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act of 1938 as amended, cannot be restricted, abrogated or nullified by any agreement entered into by an employee and employer, or by employees with their employer, or by and through a collective bargaining agreement entered into with the employer and the representative of the employees.

By the Court: (signed) A. J. Braginton,
Judge.

Final Judgment and Decree of Trial Court

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

No. 21894—Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

EDWARD D. THOMPSON (and 13 others), *Plaintiffs*,

v.

IOWA BEEF PACKERS, INC., *Defendant*.

Before the Honorable A. J. BRAGINTON, Judge.

On October 20, 1969, there was filed

FINAL JUDGMENT AND DECREE

On the 5th day of February, 1969, this court entered a judgment determining that the Plaintiffs are entitled to recover for their one-half hour lunch period at the applicable wage scale or rate as such maintenance employees of the Plaintiff for such time as they were so employed by the Defendant company during the two-year period immediately preceding the commencement of their respective actions.

On July 8, 1969, as the result of a motion to amend and enlarge the findings and to modify the judgment, this court directed the parties to submit the hours of employment and rate of pay pertaining to each Plaintiff under the judgment entered herein on February 5, 1969, and the court therein determined that none of the Plaintiffs have shown themselves to be entitled to liquidated damages.

On the 15th day of September, 1969, this court by order directed that a hearing be held on this date relative to the matter of the attorney fees, and on this date the parties have filed a stipulation in which the basic compensation of

each of the Plaintiffs was fixed for the purposes of the suit without waiving any right of appeal. At said hearing the court approved certain attorney fees in respect to each of the cases.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiffs in each of their respective cases have and recover from the Defendant the amounts hereinbelow set forth after their names, and in each of the respective cases the Plaintiff shall have and recover the total judgment as shown therein, with interest at the legal rate from and after February 5, 1969, together with the costs in each action to be entered by the clerk.

Name	Basic Compensation	Attorney Fees	Total Judgment
Edward D. Thompson	$1,261.33	$200.00	$1,461.33
Jay Nollen	1,288.87	200.00	1,488.87
Kenneth A. Harder	244.82	150.00	394.82
Donald J. Sporrer	1,338.44	200.00	1,538.44
Lawrence W. Kennedy	1,338.44	200.00	1,538.44
Albert Weaver	1,228.87	200.00	1,488.87
James R. Morgan	1,338.44	200.00	1,538.44
Val Jean Johnannsen	1,338.44	200.00	1,538.44
Raymond James Johnson	1,338.44	200.00	1,538.44
Luverne M. Hoffman	1,338.44	200.00	1,538.44
Carol W. Vennink	1,261.33	200.00	1,461.33
Ben J. Lackman	1,261.33	200.00	1,461.33
Larry James Larrison	658.48	150.00	808.48
Lawrence J. Kabela	274.12	150.00	424.12

The clerk is hereby ordered and directed to enter judgment in favor of the Plaintiff in his respective action against the Defendant for the basic compensation and attorney fees as above set out, together with the costs in said action, said judgment to bear interest at the legal rate from February 5, 1969.

By the Court: (signed) A. J. BRAGINTON,
Judge.

Order of Supreme Court of Iowa to Consolidate 14 Cases

IN THE SUPREME COURT OF IOWA

No. 21894—Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Plaintiffs*,

v.

IOWA BEEF PACKERS, INC., *Defendant*.

May 20, 1970.

ORDER OF CONSOLIDATION

And now on this 20th day of May, 1970, there having been presented to the undersigned, one of the Justices of the Supreme Court of Iowa, a joint Motion by all parties for the consolidation of these cases on appeal, with a waiver of notice of hearing by all parties;

And it appearing that for good cause shown the cases should be consolidated for purposes of appeal.

For the Court: (signed) MAURICE E. RAWLINGS
Justice of Supreme Court of Iowa

Order by Supreme Court of Iowa, Granting Stay

IN THE SUPREME COURT OF IOWA

Filed April 29, 1971

Order Granting Stay

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54323

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Appellees*,

v.

IOWA BEEF PACKERS, *Appellant*.

Now on this 29th day of April, 1971, defendant's application to stay execution of procedendo herein, having come on for hearing pursuant to prior order, defendant-applicant having appeared by Attorney Louis S. Goldberg, of Sioux City, Iowa, plaintiff having appeared by Attorneys E. A. Raun and Michael Mundt, of Denison, Iowa, arguments were duly pre-presented, the matter submitted and taken under advisement.

IT IS NOW ORDERED, ADJUDGED AND DECREED that execution of procedendo herein be and is hereby stayed for seventy (70) days from date hereof to allow defendant-applicant to petition the Supreme Court of the United States of America for review, and

IT IS FURTHER ORDERED in the event such petition be not filed within the aforesaid time, procedendo shall issue upon expiration of said seventy (70) day period, and

IT IS FURTHER ORDERED, in event such petition be so filed within the time above prescribed, then the aforesaid stay shall remain in effect until the Supreme Court of the United States of America shall have finally acted upon such petition for review, and (1) if denied then procedendo shall thereupon issue, (2) if granted said stay shall be and remain in effect until the matter shall have been finally determined by the Supreme Court of the United States of America, and

IT IS FURTHER ORDERED, for good cause shown, bond is hereby waived.

DONE this 29th day of April, 1971, in Sioux City, Iowa.

(signed) MAURICE E. RAWLINGS
Justice, Supreme Court of Iowa.

Majority Opinion by Supreme Court of Iowa

IN THE SUPREME COURT OF IOWA

Filed April 9, 1971

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EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Appellees*,

v.

IOWA BEEF PACKERS, *Appellant*.

Appeal from Crawford District Court—A. J. BRAGINTON, Judge.

Appeal from judgment for plaintiffs for overtime compensation under Fair Labor Standards Act.—Affirmed.

P. L. NYMANN, of Dakota City, Nebraska, for appellant.

RAUN & FRANCK, of Denison, for appellees.

UHLENHOPP, J.

The main question presented in this appeal is whether workmen are required to attempt contract arbitration before they can sue for overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C.A. §§ 201-219.

The case was tried by ordinary proceedings without a jury. From the evidence the trial court could reasonably find that plaintiffs were maintenance men in defendant's plant near Denison, Iowa, during the period in question from April 28, 1965, to April 28, 1967. The plant was fairly new. During the first years many breakdowns occurred, necessitating much work by the maintenance men to avoid costly "down time." A bell was sounded when the men were needed. After the plant had been constructed, a lunch room for the maintenance men was added just off the kill floor so they could answer the bell more readily.

Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period. The evidence clearly indicates, however, that until February of 1966, the lunch period existed more in name than in fact. On numerous occasions the men were obliged to answer bells during lunch. When they tried to eat lunch later, they would frequently be interrupted again by the bell.

Eventually one of the maintenance men undertook grievance procedure because he was not getting his lunch period. This precipitated a meeting by defendant's industrial relations officer with the maintenance men in February, 1966. That officer instructed the men that they were free to leave the premises during their lunch period.

The instructions appear to have been honored by the employer more in the breach than in observance. Breakdowns continued to occur, the production people needed immediate

help from the maintenance men, the bell continued to be rung during lunch periods, and the maintenance men were expected to, and did, respond. The situation did not in fact change from what it had been. A procedure for two shifts of maintenance men was attempted, but did not prove efficacious.

On April 28, 1967, plaintiffs commenced this action for compensation for their lunch periods during the preceding two years. Shortly thereafter, the industrial relations officer dealt with the situation in a letter which was sent to each maintenance man. That letter, however, related to the future.

The collective bargaining contract between the union and defendant provided grievance procedure including arbitration. The trial court overruled defendant's contention that the men had to arbitrate before they could sue, held on the facts that the maintenance men were actually on call during their lunch period for the two years in question, and granted the men conpensation accordingly. Defendant appeals.

Defendant makes three contentions here. First, the workmen were not on call during lunch periods after the instructions were given in February 1966 to the effect they could leave the premises during such periods. Second, one of the workmen who said he always got his 30 minutes for lunch at some time during the day could not in any event claim he had not gotten his lunch periods. Third, the men had to attempt arbitration before they could sue.

I. Defendant's first two contentions are primarily factual and may be considered together. The trial court's findings of fact, if supported by substantial evidence, bind us. *Rule* 344(f)(1), *Rules of Civil Procedure.*

The legal principle regarding compensable time under FLSA for being "on call" was announced in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118.

The decisions lay stress on whether the employees are actually free to pursue their own interests during their lunch period. If, in fact, the employer retains a hold on the employees for services when needed during a lunch period, so that the employees are not actually at liberty, the period constitutes compensable time. *Glen L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981 (8th Cir.); *F. W. Stock & Sons* v. *Thompson*, 194 F. 2d 493 (6th Cir.); *Wirtz* v. *Minton Rendering Co.*, 54 Lab. Cas. Para. 31,876 (U.S. Dist. Ct. N.D. Tex.); *Hofler* v. *Spearin, Preston & Burrows*, 51 Misc. 2d 758, 273 N.Y. 2d 873.

Here the men had 30 minutes for lunch. It hardly seems reasonable that the parties contemplated the men would drive from the plant to their homes or other places, eat, drive back, and be back on time. In fact, a separate lunch building was provided for them on the premises, where they would hear the bell. On numerous occasions, both before and after February 1966, they were actually called during the lunch period. On cross-examination, defendant's witness LaFleur admitted with commendable candor, "If it was a serious breakdown and the men were present, were readily accessible, they were asked to help with the breakdown, yes; if they were on their lunch break. If they were called on their lunch break and given a lunch break later, the same thing could happen. They would have to answer the bell then, too." Defendant's witness Walker made somewhat similar admissions. Defendant's witness O'Brien, telling about frequent breakdowns before new equipment was installed in recent times, stated in a letter that "The maintenance men will remember the thousands of times they had to run because the boilers have dropped out"; "Many will remember the loss of steam that caused hours of dying time and lost profits"; "The maintenance men will remember the long hard hours of work put in on the sump under the coolers."

As to the period subsequent to February 1966, the trial court found the situation was no different than before—the

men were actually on call. We do not say we would reach the same finding on the evidence, but substantial evidence supports the trial court's finding.

As to the contention that one workman actually got his 30 minutes for lunch each day, we think defendant misapprehends the rationale of *Armour & Co.* v. *Wantock.* The question is not whether a workman actually gets his 30 minutes without interruption. The question is whether he is on call during that period, or free to pursue his own interests. He may get his lunch times without interruption every day for a week or at various times throughout a given day. But if those times in fact belong to the employer, if the employee is not free but is actually subject to call during those times, then the times are compensable. The trial court could reasonably find that such was the situation here.

We cannot sustain defendant's challenges to the findings of fact.

II. What about defendant's contention that plaintiffs had to attempt arbitration before they could sue? The contract under which plaintiffs worked contained a provision for four-step grievance procedure culminating in binding arbitration. Plaintiffs did not pursue that course but brought their complaint directly to court. Did they have the choice of arbitration or litigation, or where they obliged to try arbitration first?

Defendant is engaged in interstate commerce, and substantive federal labor law applies. *Humphrey* v. *Moore,* 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370. The present controversy is undoubtedly arbitrable. *Donahue* v. *Susquehanna Collieries Co.,* 138 F.2d 3 (3rd Cir.). Agreements to arbitrate may ordinarily be specifically enforced. *United Steelworkers of America* v. *Warrior Gulf Navigation Co.,* 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409.

As a general rule, federal labor policy requires that employees seeking to assert grievances must initially attempt

to use contract grievance procedure including arbitration. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed 2d 972; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580. These decisions are founded on § 301(a) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S. C.A. § 185(a).

In accordance with this general rule, federal courts of appeal have held that employees must attempt to arbitrate FLSA claims before they can come to court. *Donahue* v. *Susquehanna Collieries Co., supra; Watkins* v. *Hudson Coal Co.*, 151 F.2d 311 (3rd Cir.); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir.); *Beckley* v. *Teyssier*, 332 F.2d 495 (9th Cir.). Some federal and state trial courts had previously held to the contrary. Annot., 24 A.L.R.2d 752.

The United States Supreme Court does not appear to have spoken on the problem as to FLSA claims, but it recently decided *U.S. Bulk Carriers* v. *Arguelles*, 91 S. Ct. 409, 27 L. Ed 2d 456 (U.S.). A federal statute which antedates the Labor Management Relations Act, requires a master or owner of a vessel to pay seamen promptly, failing which the seamen are entitled to recover "two days pay for each and every day during which payment is delayed . . . which sum shall be recoverable as wages in any claim made before the Court. . . ." 46 U.S.C.A. § 596. In *Arguelles*, a majority of the Court thought that statute indicated Congressional intent to permit a seaman to sue without first attempting arbitration, which prevailed over Congressional intent favoring prior arbitration generally.

Does the Fair Labor Standards Act indicate similar Congressional intent, leading to the belief that the United States Supreme Court will apply *Arguelles* to FLSA cases? We are inclined to think so, although the question is close.

The Fair Labor Standards Act too antedates the Labor Management Relations Act. It also contains provisions for court proceedings and penalties, indeed, considerably more

elaborate provisions than the statute involved in *Arguelles*. Under FLSA, an employer is liable to an employee for overtime pay and "an additional equal amount as liquidated damages." Action to recover such amounts "may be maintained in any court of competent jurisdiction." An employee may bring a class action with consent of the class—for himself "and other employees similarly situated." A plaintiff who is successful is entitled to "a reasonable attorney fee to be paid by the defendant, and costs of the action." The Secretary of Labor is authorized to supervise payment of unpaid overtime compensation owing an employee. The Secretary may sue to recover such overtime for an employee when so requested by him. All of these rights are contained in § 16 of FLSA, 29 U.S.C.A. § 216. In addition, the federal district courts have broad jurisdiction to enjoin violations of FLSA requirements. § 17, 29 U.S.C.A. § 217.

As stated, the federal decisions generally requiring arbitration are founded mainly on § 301(a) of the Labor Management Relations Act, giving federal courts jurisdiction to enforce collective bargaining contracts—including arbitration clauses of such contracts. We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the courts in FLSA cases. We are the more persuaded of that view by the broad Congressional policy expressed in § 2 of FLSA, 29 U.S.C.A. § 202. There the objectives of the act are set forth, and those objectives encompass more than simply wage relief for employees; they include broad economic considerations—improvement in commerce among the states. The remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of those broader objectives. We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the

seaman's act involved in *Arguelles*, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act.

Affirmed.

BECKER, LEGRAND and REES, JJ. concur,
MASON, J. concurs in result,
STUART, J. and MOORE, C.J. dissent,
RAWLINGS, J. takes no part.

Dissenting Opinion by Supreme Court of Iowa

STUART, J., dissenting.

I respectfully dissent from division II and the result. As a consequence, I would not reach the merits of the case. Federal law applies. My study of the federal cases leads me to conclude that plaintiffs were required to exhaust the grievance procedures, including arbitration, contained in the collective bargaining agreement covering the plant where they were employed before they could institute this action for overtime pay under the Fair Labor Standards Act, 29 U.S.C.A. § 201-219 (FLSA).

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available." *Republic Steel Corporation* v. *Maddox*, (1965), 379 U.S. 650, 652, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583.

Under federal law, agreements to arbitrate may be specifically enforced. *Local Union No. 721* v. *Needham Packing Co.* (1963), 254 Iowa 882, 885, 119 N.W. 2d 141, 142; *United Steelworkers of America* v. *American Mfg. Co.* (1960), 363

U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed 2d 1409; *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation* (1960), 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 1424.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkrs of America* v. *Warrior & Gulf Navigation Co., supra,* 4 L. Ed. 2d at 1417-1418; quoted in *Local Union No. 721* v. *Needham Packing Co.* (1967), 160 Iowa 908, 912, 151 N.W. 2d 540, 543.

Plaintiffs do not quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement. The narrow issue is whether a claim for overtime wages under the FLSA is an exception to these general rules.

Although the United States Supreme Court has not decided this issue, the federal circuit courts that have considered it hold grievance procedures must be exhausted before these statutory rights can be enforced in the federal courts. *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F.2d 945; *Evans* v. *Hudson Coal Co.* (3rd Cir. 1948), 14 CCH Lab. Cas. Par. 64,318, 165 F.2d 970; *Watkins* v. *Hudson Coal Co.* (3rd Cir. 1945) 10 CCH Lab. Cas. Par. 62,761, 151 F.2d 311; *Donahue* v. *Susquehanna Colleries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F.2d 3; Anno. 24 A.L.R. 2d 754, 764-766, 779-780.

Earlier New York and federal district court cases to the contrary have not been followed. *Bailey* v. *Karolyna Co.* (1943, DC NY), 50 F. Supp. 142, CCH Lab. Cas. Par. 61,550; *Voutrey* v. *General Baking Co.* (1941, DC PA), 39 F. Supp.

974; *Garrity* v. *Bagold Corp.* (1943), 180 Misc. 120, 42 N.Y.S. 2d 257, mod. on other grounds 257 App. Div. 353, 46 N.Y.S. 2d 637; *McClintock* v. *Garment Center Capitol, Inc.* (1943), 112 NYJL 1022, CCH Lab. Cas. Par. 61,814; *Re City Bank Farmers Trust Co.* (1943), 179 Misc. 770, 39 N.Y.S. 2d 842.

The FLSA does not provide that such rights *shall* be enforced in the courts. If it did, a collective bargaining agreement providing for arbitration would be ineffective. In the absence of a specific prohibition, the parties may agree between themselves how these rights shall be enforced.

> "Is there anything about the Fair Labor Standards Act which removes claims under its terms from the arbitration clause? We may concede that Congress could have done so had it wished. It could have provided that any claim under the act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language. * * *
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> "* * * (W)e see nothing in the wording of the Fair Labor Standards Act which precludes arbitration of claims under it. No doubt it creates rights which make a basis of a claim by an employee against an employer who violates it. So does any contract. A claim under the act and a claim based on a contract—each is based on a legal right which claimant asserts against someone else. Arbitration is one way by which such right can be enforced. There is no reason why it cannot be availed of to secure rights under the Fair Labor Standards Act just as well as a right arising out of a contract or imposed by law as a consequence of a tort." *Donahue* v. *Susquehanna Collieries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F. 2nd 3.

In *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F. 2d 945, plaintiffs brought an action

in the federal court to recover overtime pay for traveling to and from work under the FLSA. The proceedings were stayed by the district court. The circuit court affirmed saying:

> "The appellants contend that since they seek recovery under the provisions of the Fair Labor Standards Act and not under the Collective Bargaining Agreement, the district court erred in staying the civil action pending arbitration under the Collective Bargaining Agreement. Appellants support such contention by arguing that whether the time spent by them in traveling to and from the barracks to the job site constitutes hours worked under the Fair Labor Standards Act is a legal question which must be determined by the courts without reference to the provisions of the Collective Bargaining Agreement, and presents a question which cannot be determined by an arbitrator. Appellants cite no provision of the Fair Labor Standards Act which precludes arbitration of claims arising under it. We have found none. • • •
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> "It is clear to us that the claims of appellants are ones growing out of the relation of employer and employee and necessarily involve the application and interpretation of the contract provisions above quoted, and therefore fall squarely within Article V of the Collective Bargaining Agreement. See *Evans* v. *Hudson Coal Co.*, (14 LC 64,318) 165 F. 2d 970 (3rd Cir. 1948). To sustain appellants' contention would be to emasculate the arbitration provisions contained in the Collective Bargaining Agreement."

The United States Supreme Court has approvingly referred to this line of cases. "The reports of both Houses on that Act (Federal Arbitration Act) stress the need for avoiding the delay and expense of litigation, and practice under its terms raises hope for its usefulness both in controversies *based on statutes* or on standards otherwise

created." *Wilko* v. *Swan* (1953), 346 U.S. 427, 431-432, 94 S. Ct. 182, 98 L. Ed. 168, 174. (Emphasis added.)

It is clear to me that if plaintiffs had brought this action in federal court subject to the Federal Arbitration Act, 29 USCA § 3, proceedings would have been stayed pending arbitration. Here, defendant asks for dismissal of the suit because plaintiffs failed to exhaust the grievance procedures of the collective bargaining agreement.

Is the obligation to exhaust the internal remedies in a collective bargaining agreement modified when a judgment is sought on jurisdictional grounds in a state court? I have found no United States Supreme Court decisions on this question involving statutory rights under the FLSA, but an action in a state court by an individual for severance pay claimed to be due under the terms of a collective bargaining agreement was dismissed for failure to exhaust grievance procedures. *Republic Steel Corp.* v. *Maddox* (1965), 379 U.S. 650, 653, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583-584.

In his opinion, Mr. Justice Harlan sets forth the reasons for the strong federal policy favoring arbitration as follows:

> "But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. * * * Union interest in prosecuting employees grivances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said in the nor-

mal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 103. 7 L. Ed. 2d 593, 599, 82 S. Ct. 571."

These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision. There is less reason to permit a lawsuit here than in *Maddox* where the claim was for severance pay, the plant was closed and no one held the position of foreman any longer with whom to initiate grievance procedures.

Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on the contract.

I agree with the majority that *U.S. Bulk Carriers, Inc.* v. *Arguelles* (decided by the United States Supreme Court January 13, 1971) offers guidance on this question, but it guides me to the opposite result.

There a seaman brought an action in the federal district court for wages and a penalty alleged to be due under the provisions of 46 U.S.C. § 596, which permits seamen to

sue for wages in federal courts. The majority opinion (five justices) is based on statutory construction and reaches the conclusion that Congress in section 301(a) of the Labor Management Relations Act of 1947, 29 U.S. § 185(a) did not intend to deprive seamen of a remedy they had had since 1790. The opinion held plaintiff could either sue in the federal courts or invoke the grievance procedures of the collective bargaining agreement.

Justice Harlan, one of the majority, concurred specially stating that the cases of *Smith* v. *Evening News Asso.* (1962), 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246; *Republic Steel Corp.* v. *Maddox, supra;* and *Carey* v. *Westinghouse Corp.* (1964), 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320, "evince the crucial role of the federal judiciary in forging the proper relationships among available arbitral, administrative, and judicial forums for vindicating contractual and statutory rights of employers, unions, and employees. *In light of these cases, I cannot infer, from the mere provision by Congress of a federal judicial forum for enforcement of the wage claims of a subclass of workers' wages, that this Court is foreclosed from requiring arbitration under the collective-bargaining contract.*" (Emphasis added)

He makes the distinction between an individual's claim for wages based "simply on a contract" (*Maddox*) and a claim for wages growing out of a federal statute (*Arguelles* and the instant case) and states:

> "Where, however, the § 301 dispute implicates federal statutory rights, it is incumbent upon this Court to fashion the relationships among forums according to an analysis of the policies underpinning both § 301 and the federal statute the employee invokes, rather than simply transposing *ipso facto* the Court's labor arbitration jurisprudence."

He concluded:

> "And the difficulties of analyzing the respective boundaries of the contractual right and the statutory

right forbode ill for the efficient resolution of disputes implicating both the contract right and the federal statutory right. But the matter is not one to be decided abstractly; it may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests.

"However, this is not such a statute, because the *very essence of the legislative policy at stake here is ensuring promptness in the payment of wages.* I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. § 596 and § 301 of the Labor-Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. § 596" (Emphasis added.)

Justice White joined by Brennan, Stewart and Marshall, dissented stating: "In *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), it was held that federal courts have jurisdiction to specifically enforce the arbitration provisions of the collective-bargaining agreement. And it has been clear at least since *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), that absent extraordinary circumstances not alleged here, contractual grievance procedures must be exhausted before suit can be brought."

On the distinction between contract and statutory rights he said: "nor until now has there been any principle which requires contract rights to be resolved internally but directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues which are cognizable under the arbitration clause. In fact, this Court and lower federal courts have endorsed the suitability of arbitration

to resolve federally created rights. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court expressed 'hope for (arbitration's) usefulness • • • in controversies based on statutes • • •' 346 U.S. at 432. And circuit courts of appeal both before and after passage of § 301 have required that FLSA employee's claims for liquidated damages under 29 U.S.C. § 216(b) for failure to pay overtime wages be referred to contractual grievance procedures before being presented to the court."

In view of the federal cases, the position of the minority and Justice Harlan's concurring opinion in *Arguelles* and his generally favorable view toward arbitration, I believe the federal law to be that congressional policies are best reconciled by holding that actions for wages under the FLSA are under the general rule that contract grievance procedures must be exhausted before an action can be brought in the courts. There is nothing in the majority opinion to indicate disagreement with this conclusion. The peculiar facts which persuaded the court Congress did not intend to take away a traditional remedy in *Arguelles* are not present in this case.

I would dismiss the action as having been brought prematurely.

MOORE, C. J., joins in this dissent.

Some Sections of the Collective Bargaining Agreement

AGREEMENT BETWEEN IOWA BEEF PACKERS AND ASSOCIATED EMPLOYEES ORGANIZATION

ARTICLE III—PURPOSE OF AGREEMENT

SECTION 1: It is the intent and purpose of the parties hereto that this Agreement shall promote and improve the industrial and economic relationships between the Company, the Union and its members as set forth herein and to set forth herein rates of pay, hours of work, and other

conditions of employment to be observed between the parties hereto.

SECTION 2: It is recognized by both parties that they have a mutual interest and obligation in maintaining friendly cooperation between the Company and the Union which will permit safe, economical and efficient operation of the plants.

ARTICLE VII—HOURS OF WORK

SECTION 3: Time and one-half (1½) will be paid for hours worked in excess of eight (8) in any day. Time and one-half (1½) will be paid for all hours worked in excess of forty (40) in any one week.

ARTICLE XIV—MEALS

SECTION 1: A lunch period shall be provided no later than five (5) hours from the start of an employee's shift, except when the shift does not exceed five and one-half (5½) hours.

ARTICLE XX—GRIEVANCE PROCEDURE

SECTION 1: Should the Union or any individual employee desire to process a grievance pertaining to a violation of the Agreement, the matter shall be handled according to the following steps:

STEP I

The employee involved, with a Union representative if he so desires, shall discuss the matter with his immediate supervisor. In the event he does not receive a satisfactory answer, he shall within Ten (10) days of the knowledge of the incident submit a written grievance to his immediate supervisor. The supervisor shall provide a written answer to the employee within seven (7) days.

STEP II

If the matter is not settled in the first step, the Union grievance committee or any officers designated by the Union

shall present the matter to the Plant Superintendent for his decision. Grievances in this Step must be presented within five (5) working days after the answer in the First Step. At this point the grievance presentation shall be made in writing on the Employee's and steward's own time. Meetings shall be scheduled as near as possible to shift changes.

Step III

If the matter is not settled in the second step, the Union grievance committee or any officer designated by the Union shall present the matter to the Plant Manager for his decision. Grievances in this step must be presented in writing within five (5) days after the answer at the second step. The Plant Manager shall have five (5) working days within which to give his answer in writing to the Union. Prior to submission to arbitration, the Union may request a further reasonable extension of time for the purpose of holding a meeting with the Vice President of Industrial Relations or his Designeee in an effort to resolve the grievance.

Section 2: Arbitration Provision—If at the final step of the Grievance Procedure the matter is not satisfactorily adjusted, the grievance or dispute may be submitted to an impartial arbitrator to be selected by mutual agreement of the parties. A written request for arbitration shall be made within thirty (30) days of the Step 3 answer. If within fifteen (15) working days after receipt of such written request the parties are unable to agree upon an arbitrator, either party shall request a list or lists of names from the Federal Mediation and Conciliation Service. The Union and the Company shall then alternately strike names until a single arbitrator is left. He will then be selected as the arbitrator for the arbitration in question. His decision in the grievance shall be final and binding on the parties, provided he shall not have authority other than to apply the terms and conditions specifically set forth in the Agreement. The arbitrator shall submit his decisions,

in writing, within thirty (30) days after the conclusions of the hearing, or hearings as the case may be. The compensation and necessary expenses of the arbitrator shall be borne equally by the Company and the Union.

SECTION 3: The parties agree that the time allowed to process grievances is adequate. If the Union fails to process a grievance in the time specified herein, the grievance in question is ended. However, if either party requests a reasonable extension, the time limit specified for the discussion between the Plant Manager and representative of the Union, the time specified in Section 1 hereof shall be extended.

Other Sections of Collective Bargaining Agreement

ARTICLE VI—COMPANY AND UNION RESPONSIBILITIES

SECTION 1: During the term of this Agreement there shall be no strike, stoppage, slow-down or suspension of work on the part of the Union or its members, or lock-out on the part of the Company. In the event of a breach of this provision, the Union shall immediately declare publicly that such action is unauthorized and shall promptly order its members to resume their normal duties notwithstanding the existence of any picket line. The Union further agrees that it will in no way interfere with the business of the Company by sanctioning or conducting a boycott on the handling of goods procured from a source or destined to a point where labor controversy may exist.

SECTION 2: The company shall have the right to determine the discipline given an employee or employees for breach of this Article. The Union shall, however, have the right to grieve the question of fact as to whether or not an employee or employees have breached the provisions of this Article.